STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

TONY PETRICH, Charging Party,	)	Case No. LA-CE-2359
v.	)	PERB Decision No. 639
RIVERSIDE UNIFIED SCHOOL DISTRICT, Respondent.	)	November 23, 1987

Appearances; Tony Petrich, on his own behalf; Best, Best & Krieger, by Bradley E. Neufeld for Riverside Unified School District.

Before Hesse, Chairperson; Craib and Cordoba, Members.

DECISION

CRAIB, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the charging party, Tony Petrich, to the attached proposed decision of a PERB administrative law judge (ALJ). The ALJ dismissed the complaint, finding that the charging party failed to establish a prima facie case as to any of the allegations contained therein. Charging Party alleged that Respondent, Riverside Unified School District, placed him on paid leave and then later dismissed him from employment in reprisal for protected activity. Charging Party further alleged that Respondent unilaterally altered portions of the dismissal procedures specified by the collective bargaining agreement.

We have carefully reviewed the entire record, including the proposed decision, the transcript, the exceptions filed by the charging party and the response to the exceptions file by Respondent. Finding the ALJ's findings of fact and conclusions of law free of prejudicial error, we adopt them as the Decision of the Board itself. However, we believe that one of Charging Party's exceptions requires response.

Charging Party asserts that unlawful motivation may be inferred from the failure of Paul Paynter, Assistant Superintendent for Personnel, to conduct an independent investigation of charges of misconduct and poor job performance submitted by Charging Party's immediate supervisor, Phillip Hodnett. The ALJ concluded that there was no obligation to conduct such an investigation because the record failed to demonstrate that Paynter had any reason to question the documentation submitted by Hodnett.

We adopt the ALJ's reasoning and further hold that, absent evidence casting suspicion upon the employer's actions, the mere failure to conduct an independent investigation of a supervisor's charges of misconduct or poor job performance does not itself reflect unlawful motivation. Such action must be evaluated on a case by case basis within the context in which it occurred. Among the factors to be considered would be whether the employer has a policy or practice of conducting such investigations and whether the record otherwise reflects anti-union animus on the part of the supervisor or the reviewing decision maker. For example, in Woodland Joint

Unified School District (1987) PERB Decision No. 628, we inferred unlawful motivation from the failure of an administrator to inquire as to the charging party's version of events (even though the administrator did speak with the charging party's accusers). However, in that case, the administrator's conduct was found to be a departure from the respondent's established disciplinary procedures and the immediate supervisor was found to have long-standing anti-union sentiments.

Here, Charging Party has not demonstrated that the respondent had any established practice regarding disciplinary investigations, much less that Paynter's conduct was a departure from it. Nor has the charging party otherwise established that either Paynter or Hodnett was motivated by anti-union animus or that there were other circumstances that would cast suspicion upon their actions. Therefore, there is no reason in this case to infer unlawful motivation from the failure to conduct an independent investigation of the charges of misconduct and poor job performance against the charging party.

ORDER

Case No. LA-CE-2359 is hereby DISMISSED.

Chairperson Hesse and Member Cordoba joined in this Decision.

STATE OF CALIFORNIA

PUBLIC EMPLOYMENT RELATIONS BOARD

TONY PETRICH, Charging Party, v. RIVERSIDE UNIFIED SCHOOL DISTRICT, Respondent.	)	UNFAIR PRACTICE Case No. LA-CE-2359 PROPOSED DECISION (6/5/87)

Appearances: Tony Petrich, on his own behalf; Best, Best & Kreiger, by Charles D. Field, and Cathrine Nove for Riverside Unified School District.

Before: James W. Tamm, Administrative Law Judge

PROCEDURAL HISTORY

On March 17, 1986, Tony Petrich (hereinafter Charging Party or Petrich) filed this charge against the Riverside Unified School District (hereinafter District). The charge alleged that Petrich had been placed on paid leave and dismissal proceedings had been initiated against him because of his protected activities. On May 13, 1986, Charging Party amended the charge, alleging that during his dismissal hearing the District unilaterally altered portions of Article 19 of the contractual dismissal procedure.

A complaint was issued June 19, 1986, and a corrected

complaint was issued June 23, 1986. Informal settlement conferences were held,[1] however, the matter remained unresolved. A formal hearing was held on December 8 and 9, 1986.

At the hearing, Charging Party sought to amend the complaint regarding two issues. The first amendment reflected that since the time the original charge was filed, the District had actually discharged the Charging Party. Therefore, Petrich sought to include the discharge itself as part of the District's retaliation against him. The District did not object to this amendment and it was therefore allowed.

A second amendment was to allege unilateral changes to Article 17 of the Collective Bargaining Agreement. That article deals with records being placed into personnel files. This amendment sought to raise an issue never before raised, (i.e., when must documents be placed into personnel files in order to use them for disciplinary purposes). Since the District was unprepared to litigate that issue and because Charging Party could offer no satisfactory reason for waiting until the beginning of the hearing to raise that issue, the

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[1]The undersigned Administrative Law Judge (ALJ) was assigned to conduct a settlement conference in this case. Generally, ALJs conducting settlement conferences are not assigned the formal hearing in the same case. However, the parties in this case requested I also conduct a formal hearing and waived any objections on the record.

motion to amend was denied.[2]

At the conclusion of the hearing, a transcript was prepared. Briefs were filed and the matter was submitted for decision on February 10, 1987.

FINDINGS OF FACT

Tony Petrich was hired by the District in approximately 1971 as a gardener. At some later date, he was transferred to a position of gardener/custodian. His duties regularly included picking up trash, cleaning the student parking lot, chopping weeds, cleaning restrooms and assisting in the clean-up of trash in the school's arcade following the student lunch period. His early years of employment were apparently uneventful. However, from August 1983 until July 1985, the District gave Petrich a series of verbal warnings and counseling sessions, along with eleven (11) written reprimands, culminating in a recommendation for a 30-day suspension. The Charging Party, represented by the California School Employees Association (CSEA), appealed the suspension to advisory arbitration. The arbitrator found Petrich guilty of inattention to and dereliction of duty, failing to perform

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[2]At the hearing, Charging Party sought to enter testimony regarding Article 17 to show that documents were used to support his dismissal which had not previously been placed in his personnel file. To the extent such evidence was admitted, it was allowed only to support Charging Party's argument of shifting justifications for his discharge and not to support allegations of unilateral changes to Article 17 of the contract.

[3]Charging Party Exhibit No. 11.

assigned duties in a satisfactory manner, failing to obey directions and observe rules of the campus and a persistently discourteous attitude toward the administration and fellow employees. Nevertheless, the arbitrator recommended the 30-day suspension be reduced to a 10-day suspension.[4]

On September 23, 1985, Petrich's immediate supervisor, Plant Supervisor Phillip Hodnett, wrote a memorandum to Paul Paynter, Assistant Superintendent for Personnel, detailing Petrich's poor attendance and job performance since Petrich's return from the suspension. According to Hodnett, between September 3, 1985, and September 23, 1985, Petrich had been either absent from work or tardy on 15 days. Hodnett also complained that Petrich had refused to clean the girls' restroom after repeatedly being told to do so.

During the weeks following the memorandum, Petrich continued a consistent pattern of tardiness and Hodnett continued documenting it.

On November 14, 1985, Petrich filed an unfair practice charge against CSEA.[5] In the charge, Petrich named his supervisor, Hodnett, as acting on behalf of CSEA in coercing employees.[6]

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[4]The arbitrator reasoned that never before had the District suspended an employee for more than five (5) days. Therefore, a 10-day suspension would be sufficient.

[5]Case No. LA-CO-347.

[6]Specifically the charge alleged that on November 6, 1985, when Hodnett handed out official Public

Although Petrich served a copy of the charge upon counsel for the District, there is no evidence that charge was ever brought to Hodnett's attention. Hodnett credibly testified that he had never seen the charge nor even heard of it until he was questioned about it by Petrich at the hearing. Paynter testified that, although he had no specific recollection of the charge being brought to his attention, he was probably informed of the charge by the District's counsel shortly after it was filed. Other than being informed about the charge, Paynter had no further dealings with the charge. Because the charge was not against the District, no action was necessary, so he gave it no further thought. Paynter never brought the charge to Hodnett's attention.

Paynter did testify, however, that he was aware that Petrich had filed a number of unfair practice charges against the District as well as against CSEA and the Teachers Association.[7]

Employee Retirement System election ballots, he also distributed a CSEA memorandum endorsing a particular candidate. This charge was dismissed by the Public Employment Relations Board (PERB or Board) Regional Attorney for failure to state a prima facie violation. The dismissal was upheld by the Board in California School Employees Association (Petrich) (1986) PERB Decision No. 577.

[7]A review of PERB case files indicates that Petrich is Charging Party in approximately 20 charges: thirteen (13) against the District, two (2) against CSEA, and two (2) against the Teachers Association. Although many of the charges were not filed until after his dismissal, the District stipulated at the hearing that it had knowledge of Petrich's unfair practice charge filings prior to his dismissal.

On November 25, 1985, Paynter sent Petrich a Notice of Intent to Recommend Dismissal. The Notice of Intent accused Petrich of: (1) inattention to or dereliction of duty; (2) failure to perform assigned duties in a satisfactory manner; (3) failure to obey directions or observe rules of school district superiors, and (4) persistent discourteous treatment of fellow employees. The Notice of Intent, based upon documentation supplied by Hodnett, specified 49 alleged instances of misconduct between September 3, 1985, and November 20, 1985. Paynter drafted the notice upon receiving the supporting documentation from Hodnett. Paynter then had copies of the notice and of Hodnett's memorandum placed into Petrich's personnel file.

Although there is no set format for such notices, the first page of the notice advised Petrich of his rights under the District's dismissal procedures. Most of the second, third, and fourth pages listed specific allegations against Petrich by date. In the final paragraph on page 4, the allegations were more general such as "In addition to the above listed specific acts or omissions, you have routinely been uncooperative and argumentative with your immediate supervisor . . . ". Petrich responded to the Notice of Intent on November 28, 1985, denying all allegations against him and requesting a hearing regarding the matter.

On December 3, 1985, Petrich filed a grievance with the District alleging that the District had improperly calculated

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the salary schedule for all classified employees. Petrich filed the grievance with Hodnett who said he did not understand the grievance and claimed to know nothing about how the salary schedule was calculated. Hodnett wanted to bypass the normal Level I meeting and moved it directly to Level II where it could be handled by Paynter. Petrich's insistence on holding a meeting with Hodnett over the grievance angered Hodnett. Hodnett contacted Paynter and was told to go ahead and hold the Level I meeting if that was what Petrich wanted. At the meeting, Hodnett told Petrich he was angry about having to hold a meeting over an issue he knew nothing about and could not possibly remedy.

When the grievance was moved to the second level, Paynter recalculated Petrich's salary in the manner that Petrich urged in the grievance and discovered that it would result in a reduction of salary to Petrich rather than an increase. Paynter later denied the grievance at Level II on January 16, 1986.

On December 19, 1985, a pre-termination (Skelly) hearing was held with Petrich represented by CSEA. At the hearing, Petrich was given an opportunity to rebut the allegations against him and to dissuade the District from going forward with the dismissal. After considering Petrich's arguments, the

[8]The same subject was the basis of an unfair practice charge filed a day earlier. That charge (LA-CE-2292) was withdrawn by Petrich prior to formal hearing.

District decided to go forward with the discharge. The next day, December 20th, Paynter mailed Petrich a notice that his dismissal was to be effective January 6, 1986.

Article 19.5.2 of the Collective Bargaining Agreement in effect at that time required the District to attach to the notice copies of documents and other materials which supported the purposed action. When Paynter sent Petrich the notice, he inadvertently failed to attach the supporting documents as required by the contract.

Prior to this omission being brought to Paynter*s attention, Paynter had received a request from the principal at Petrich's school that Petrich be removed from that campus. Petrich*s refusal to perform his work was, according to the principal, generating a great deal of animosity among other employees at the site. Paynter felt it would be impractical to move Petrich to another school since the District had already decided to dismiss him, so it was decided to simply put Petrich g on paid leave until his dismissal. That decision was made prior to the 1985 Christmas vacation and was carried out on January 3, 1986. On that day, Paynter personally delivered a written notice of the paid leave to Petrich. Paynter had Hodnett accompany him to receive Petrich's school keys.

[9]Article 19.2 of the contract provides that a suspension with pay may be made pending formal action by the District. The District has taken similar action with other employees in the past.

Paynter told Petrich the paid leave would give him more time to prepare his defense to the pending dismissal but did not discuss the issue further.

That same day, Petrich filed a grievance regarding Paynter*s failure to attach supporting documents to the earlier dismissal notice. When Paynter received the grievance, he checked Petrich's file and verified that he had not attached the documents. Paynter then issued a new notice of dismissal which included the supporting documents. Petrich was told to disregard the earlier notice and that his dismissal effective date was extended until February 3, 1986. Petrich was kept on paid leave for the additional time.

Petrich grieved his dismissal to advisory arbitration. A hearing was held and the arbitrator, Kenneth Perea, held that Petrich was guilty of inattention to or dereliction of duty, failure to perform assigned duties in a satisfactory manner, and failure to obey directions or observe rules of school district superiors. Perea specifically found that Petrich had been tardy on 38 occasions between September 3, 1985, and November 20, 1985, and that he had failed to clean the women's restroom on nine (9) instances within the same period. Petrich had also been inefficient in his duties by refusing to use a "yard vacuum" to clean the parking lot, continuing to use a small broom and dustpan instead. Perea concluded by recommending the discharge of Petrich.

During the arbitration hearing, as part of his case in chief, Petrich offered an affirmative defense by testifying that he had never been told he was responsible for certain duties. On cross-examination, the District offered documentary evidence to impeach Petrich's testimony. Petrich objected to the introduction of these documents because they had not accompanied the District's dismissal notice.

Perea ruled that documentary evidence offered for impeachment purposes and in rebuttal to the union's affirmative defense should not be excluded from evidence based upon Article 19.5.2 of the contract. Perea held it would have been unreasonable to have required the District to provide copies of the rebuttal documents at the time the dismissal notice was issued since the District was not then aware of what the union's contentions in the hearing would be.

At the unfair practice hearing, Petrich offered testimony of CSEA Senior Field Representative Alan Aldrich. Aldrich had been involved in two other discharge arbitrations prior to Petrich's. Aldrich testified that he had no recollection of the District's seeking to enter into the record any additional documents that were not included with the District's dismissal notice in the two previous cases.

Immediately after the District received the arbitration decision recommending Petrich's dismissal, Paynter sent Petrich a letter saying that Petrich's dismissal would be submitted for action by the school board at its next closed session. That

letter was delayed by the mailroom over the weekend and mailed to Petrich the same day as the school board's closed session. On May 5, 1986, the District's school board dismissed Petrich.

ISSUES

1. Did the District place Charging Party on paid leave and discharge him because of his exercise of protected activities? and,
2. Did the District unilaterally alter Article 19 of the Collective Bargaining Agreement by introducing, at an arbitration hearing, documents which had not been attached to the District's Notice of Proposed Disciplinary Action?

DISCUSSION

A. Allegation of Discrimination.

Under EERA section 3543.5(a), it is unlawful for a public school employer to:

> impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain or coerce employees because of their exercise of rights guaranteed by this chapter.

In Novato Unified School District (1982) PERB Decision No. 210, the Board set forth the standards to be applied in cases where employers are alleged to have discriminated against employees because of an exercise of protected rights. Under the Novato test, a prima facie case of discrimination or reprisal because of protected activities is established if

charging party can prove that: the employee participated in protected activities; the protected activity was known to the employer; and the action of the employer was motivated at least in part by the employee's protected activities.

Since the employer's motivation can rarely be proven by direct evidence, unlawful motivation can be inferred from circumstantial evidence such as, among others: an examination of the timing of the alleged discriminatory conduct in relation to the exercise of protected rights; disparate treatment of similarly situated employees; a change in or departure from established policy, procedure or practice when dealing with the affected employee; inconsistent or contradictory justifications offered for the adverse actions taken against the employee; failure to offer justification to the employee at the time the action is taken; perfunctory investigation of the contentions of the alleged discriminatee, or a harsh response by the employer to an employee's protected activities.[10]

Once the charging party has made a prima facie showing sufficient to support an inference that the exercise of employee rights granted by the Educational Employment Relations Act (EERA) was a motivating factor in the employer's action, the burden shifts to the employer to prove that its actions

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[10]See Santa Paula School District (1985) PERB Decision No. 505; Rio Hondo Community College District (1982) PERB Decision No. 226; San Diego Community College District (1983) PERB Decision No. 368, and Baldwin Park Unified School District (1982) PERB Decision No. 221.

would have been the same despite the protected activity. The test adopted by the Board is consistent with precedent in California and under the National Labor Relations Act (NLRA) requiring the trier of fact to weigh both direct and circumstantial evidence in order to determine whether an action would not have been taken against an employee "but for" the exercise of protected rights. See, e.g., Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721, 727-730; Wright Line, Inc. (1980) 251 NLRB 150 [105 LRRM 1169] enforced in part (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513].[11] Hence, assuming a prima facie case is present, an employer has the burden of producing evidence that the action would have occurred in any event. Martori Brothers Distributors v. Agricultural Labor Relations Boards supra. at 730.

B. Protected Activity.

The complaint in this case alleges the Charging Party engaged in protected activity by filing unfair practice charges on November 14, 1985, and December 2, 1985, and by filing grievances on December 3, 1985, and January 3, 1986. The

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[11]The construction of provisions of the NLRA as amended 29 USC 151 et seq. is useful guidance in interpreting parallel provisions of the EERA. See San Diego Teachers Association v. Superior Court (1979) 12 Cal.3d 1, 12-13; Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 616; compare section 3543.5(a) of the act with sections 8(a)(l) and (3) of the NLRA, also prohibiting interference and discrimination for the exercise of protected rights.

Charging Party argues that the November 14th unfair practice charge, alleging Hodnett interfered with employee rights on behalf of CSEA, triggered his discharge. This argument is not supported by the record. Hodnett had no knowledge of the charge until the day of his testimony in this unfair practice hearing. Although Paynter did have notice of the November 14th charge, it caused him no concern because it was filed against CSEA and not the District. Because it had no impact upon the District, Paynter did not even bother to bring it to Hodnett's attention.

It should also be noted that the unfair practice charges and grievances filed December 2 and 3, 1985, and January 3, 1986, were all filed after the decision had been made to dismiss Petrich and would therefore offer no support to the Charging Party. Nevertheless, Petrich has filed an abundance of other charges against the District and the District stipulated at the hearing that it had knowledge that Petrich had engaged in protected activity. Therefore, for purposes of this analysis, it is found that Petrich had engaged in protected activity and that the District had knowledge of that protected activity.

C. Unlawful Motivation.

Once Charging Party's protected conduct and the District's knowledge of such protected conduct is established, the Charging Party must show sufficient evidence to support an inference that the protected conduct was a motivating factor in the District's decision to place him on paid leave and terminate him. Petrich offers numerous arguments to support such an inference.

The first involves the use of documents from his personnel file. Charging Party argues that documents must be physically placed in the personnel file in the District's central office before they could be used for disciplinary purposes. The record here reflects that when Paynter received the memorandum from Hodnett he drafted the notice of intent to dismiss, then placed a copy of the notice and the memorandum from Hodnett into Petrich's personnel file contemporaneously with sending a copy to Petrich. To require the District to first physically place Hodnett*s memorandum into Petrich's file, then immediately thereafter remove it from the file to use in drafting the disciplinary notice, puts form over substance. The fact that the District put the memorandum from Hodnett into Petrich's personnel file at the same time as the notice to Petrich does not evidence unlawful intent.

In a related argument, Petrich reasoned that since Hodnett's notes were maintained in a place other than the central personnel file, the District must have created a "secret file," which evidences unlawful intent. Under this theory, a supervisor would be precluded from keeping track of attendance unless he sent a memorandum to the personnel file each and every time the employee was tardy or absent. In Petrich's case, this would have amounted to literally dozens of separate memoranda to his file rather than one memorandum detailing his poor attendance over a period of several months. The fact that Hodnett kept attendance and performance records does not lead to

the conclusion that the District kept a separate secret file on Petrich. Petrich also argues that this practice was a departure from established District policy; however, the record contains no evidence supporting that argument.

Petrich next argues that Paynter's failure to conduct an independent investigation of Hodnett's allegations evidenced unlawful intent. According to Charging Party, this shows Paynter's preoccupation with getting rid of Charging Party and that Paynter had no real concern about the substance of any of the allegations. However, Petrich never established that Paynter had any reason to doubt Hodnett's records and thus there existed no obligation to do an independent investigation. Furthermore, Petrich was given ample opportunity to refute the District's allegations at a pre-termination (Skelly) hearing, the arbitration proceeding, and the unfair practice hearing itself. Except for a few minor discrepancies, Petrich was unable to refute them.

The next argument deals with the manner in which the dismissal notice was typed. Petrich argues that because the final paragraph on page 4 was in summary form rather than a listing by date of occurrence, as were the first several pages of the notice, it evidences unlawful motive. There is, however, no set format for such notices.[12] The intent is to apprise

[12]Petrich argues in his brief that Articles 19, 19.5, and 19.5.2 of the contract and the Education Code section 45116 require that the statement of the alleged acts or omissions be accompanied by the dates of the purported misconduct. There is, however, no such requirement in any of those sections.

the employee of allegations against him. This notice clearly did that. The fact that allegations in one particular paragraph were typed in summary form rather than listed by the date of each offense does not evidence unlawful motive.

Charging Party also cites Hodnett's open hostility toward him regarding the salary grievance as evidence of unlawful motive. Petrich is correct that Hodnett displayed hostility toward him. However, the hostility does not evidence unlawful motive regarding his discipline for two reasons. First, this meeting took place after the decision to dismiss Petrich had already been made and, therefore, the dispute about the Level I meeting could not have influenced the decision to dismiss Petrich. Second, Hodnett's irritation was understandable under the circumstances. Hodnett knew nothing about the substance of the grievance, did not even understand it, and could not remedy it even if he had wanted to. Hodnett was not angry at Petrich for filing the grievance but rather because Petrich insisted upon holding an entirely frivolous meeting prior to sending the grievance to Paynter, who could effectively deal with it.

Charging Party's next argument regarding unlawful motive is that the District's decision to remove him from campus was made the same day as and in retaliation for a grievance filed January 3, 1986. This is incorrect because the decision to remove Petrich from the campus had been made by Paynter prior to the Christmas vacation. Furthermore, Paynter's uncontradicted testimony was that the decision was made at the request of the

principal because Petrich's refusal to do assigned tasks was causing animosity among other employees at the work site. This was also a procedure expressly allowed under the collective bargaining agreement and used by the District in the past.

Petrich next argues that the District deliberately omitted supporting documents from the December 20th dismissal notice. Once again, however, uncontradicted evidence thoroughly refutes this argument. Paynter inadvertently omitted the documents and, when it was brought to his attention, he not only supplied the documents but he also extended Petrich's paid leave status for an additional month to avoid any prejudice to Petrich. Thus, it is difficult to read anything sinister into Paynter's actions.

Petrich points out three instances occurring during his dismissal arbitration which he says helped established a nexus between his protected activities and the actions taken against him. The first was that, according to Petrich, the District raised an entirely new issue at the hearing. According to Petrich, the District had accused Petrich of failing to use a "yard vacuum" to clean the parking lot for the first time at the hearing. This argument is clearly contrary to the record. The notice of disciplinary actions specifically included the following:

> On numerous occasions, you have refused to use assigned equipment, delaying completion of your assigned tasks. For example, you routinely used a small broom and dustpan to clean the parking lot, contrary to direct instructions. This is inefficient beyond belief, insubordinate, and a direct violation of Mr. Hodnett's directions.

The second incident occurred when Petrich was being cross-examined and counsel for the District called him "the biggest liar that ever walked the face of the earth." This, according to Petrich, is "clearly cruel and abusive treatment and evidence of unlawful intent." This was, however, said during an adversarial arbitration, while counsel was seeking to impeach Petrich's testimony on cross-examination. As such, it was nothing more than the District's attempt to discredit Petrich's testimony in the eyes of the arbitrator. The statement was offered by Petrich without any other context which would demonstrate unlawful motive.

The final incident stemming from the arbitration hearing was that the District sought to offer as evidence documents which had not been attached to the notice of disciplinary action. Petrich argues this is evidence of disparate treatment. The documents were offered, however, as rebuttal to one of Petrich's affirmative defenses. The District was unaware of the defense at the time the disciplinary notice was issued. As will be more fully discussed later in the decision regarding allegations of unilateral changes to Article 19, the Charging Party has failed to prove that the practice was either out of the ordinary or improper. It does not therefore support a finding of unlawful motivation.

Immediately after the District received the arbitration decision recommending Petrich's dismissal, Paynter sent Petrich a letter saying that Petrich's dismissal would be submitted for

action by the school board at its closed session. That letter was delayed by the mailroom over the weekend and mailed to Petrich the same day as the school board's closed session. Petrich argues without any supporting evidence on the record that the delay was deliberately arranged by Paynter and was, according to Charging Party, "conduct unbecoming any District administrator and, therefore, evidence of unlawful intent." This argument is totally without basis in either fact or law and is no support to Charging Party.

In summary, although the Charging Party has engaged in protected conduct, there is no support for a finding that he was disciplined for that protected activity. Charging Party has not been able to show disparate treatment in either placing him on paid leave or terminating him. There was no evidence that other employees in similar circumstances were treated differently. The only arguable departure from established procedure was the District's inadvertence in omitting certain documents from the disciplinary notice and the District's offering certain rebuttal documents at Petrich's arbitration hearing. The omission of documents from the notice was corrected without prejudice to Petrich. It is also unreasonable to attach unlawful motivation to the District's offer of rebuttal documents at the arbitration, because until the time of the arbitration, the District was unaware of Charging Party's affirmative defenses.

The timing of the action is also insufficient to establish

a nexus since Charging Party has filed a steady barrage of charges over a period of several years. Disciplinary action taken at any given point in time would have followed shortly behind the filing of a charge. That, by itself, does not create an inference of unlawful action.[12] Furthermore, the specific charges and grievances pointed to by Charging Party as triggering events were either filed against his union, thus having little, if any, impact upon the District, or filed after the disciplinary action had already been decided upon.

Although Paynter did not conduct an independent investigation of the allegations against Petrich, there was no convincing evidence presented at the hearing that Hodnett's claims against Petrich were in any way inaccurate or that an investigation was warranted or even standard procedure in such cases. Furthermore, Petrich had ample opportunity to refute the District's allegations during two arbitrations, a Skelly hearing and an unfair practice hearing and he has been unable to do so.

Finally, the District has not offered inconsistent or contradictory justifications for its actions against Petrich. The District has consistently cited Petrich's attendance

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[12]In Charter Oak Unified School District (1984) PERB Decision No. 404, the Board noted that a "coincidence in time" by itself is insufficient to prove unlawful motivation. Were that the case, any employee who perceived that he or she might be in danger of disciplinary action could shift the burden of producing evidence merely by filing a grievance or unfair practice charge.

records and nonperformance of work as assigned by Hodnett as the reason for the disciplinary action taken against him.

Thus the Charging Party's case consists of nothing more than unsupported accusations which do not create a nexus between Charging Party's protected activity and the action taken against him. The complaint should therefore be dismissed for failure to establish a prima facie violation.

Assuming, for the sake of argument only, however, that Charging Party had been able to establish a nexus and shift the burden of proof to the District, the result would be the same. The evidence supports a finding that the District followed a rather moderate course of progressive discipline. This started with counseling sessions and verbal warnings apparently having little or no impact upon Charging Party's work performance or attendance. That led to written warnings and an unpaid suspension. Following his suspension, Petrich continued to defy his supervisor's instructions and failed to improve his attendance record, which led to his removal from the work site and his dismissal. The record in this case clearly supports the termination of Charging Party for just cause.

D. Unilateral Change

As an independent violation, Charging Party argues that the District unilaterally altered Article 19 of the Collective Bargaining Agreement by introducing into evidence at an arbitration hearing documents which had not been included with the disciplinary notice.

Section 3541.5(b) provides that:

> The board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based upon alleged violation of such an agreement that would not also constitute an unfair practice under this chapter.

The leading case interpreting this section is Grant Joint Union High School District (1982) PERB Decision No. 196 where the Board held:

> The Act is designed to foster the negotiation process. Such a policy is undermined when one party to an agreement changes or modified its terms without the consent of the other party. PERB is concerned, therefore, with the unilateral change in established policy which represents a conscious or apparent reversal of a previous understanding, whether the latter is embodied in a contract or evident from the parties' past practice. [Citations omitted.]

The Board went onto hold that in order to establish a prima facie case of unlawful unilateral change in, or repudiation of, a contract or past practice, the charging party must show: (1) that the respondent has breached or otherwise altered the party's written agreement or its own established past practice and (2) that the breach constituted a change of policy having a generalized effect or continuing impact on the terms and conditions of employment of bargaining unit employees.

The Charging Party in this case has not met that burden. The only policy or practice that Charging Party established on the record is that the District is required to provide to employees those documents upon which it basis its disciplinary

action. As also found by the arbitrator in interpreting Article 19 of the contract, there is no evidence that this policy limited the District's right to impeach Petrich's testimony on rebuttal. It would be a nonsensical policy which required the District to provide all rebuttal documents to an employee's affirmative defenses at a stage in the proceeding when the District had no knowledge whatsoever of those affirmative defenses. The testimony of Aldrich that he could not recall the District introducing similar documents during two previous disciplinary arbitrations is not persuasive evidence that such a standard exists. Charging Party has therefore failed to demonstrate that the District breached or altered portions of Article 19 of the contract or any established past practice.

Furthermore, even if such a policy or practice had been breached in Petrich's case, there is no evidence whatsoever that the breach had a generalized effect or a continuing impact upon terms and conditions of employment of bargaining unit members. Quite the contrary is true. The District's actions seemed to be limited to one arbitration regarding a single employee. Thus this issue is at most a contract dispute, remedial through arbitration or courts but not a violation of the EERA. This allegation therefore must also be dismissed.

CONCLUSION

Although the Charging Party has engaged in protected conduct of which the District was aware, there is no persuasive

evidence that the protected activity was a motivating factor in the disciplinary action taken against him. The Charging Party has also failed to demonstrate that the District unilaterally altered Articles 19 and 19.5.2 of the Collective Bargaining Agreement by introducing impeachment documents in rebuttal during Charging Party's dismissal arbitration.

PROPOSED ORDER

The complaint in this case is hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final unless a party files a timely statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. See California Administrative Code title 8, part III, section 32300. A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing, ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . .". See California Administrative Code, title 8, part III, section 32135. Code of Civil Procedure section 1013 shall apply. Any statement of exceptions and supporting brief must be served concurrently

with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300, 32305, and 32140.

Dated: June 5, 1987

JAMES W. TAMM
Administrative Law Judge